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Recent Developments in America's Refugee Laws†

Current developments in America's refugee laws feature two statutes enacted several years ago: The Act of October 3, 1965[1] which amended the Immigration and Nationality Act[2] in a number of respects; and the Act of November 2, 1966,[3] the Cuban refugee admission measure. Two sections of the 1965 statute which concern refugees have been the subject of recent litigation. These are Sections 203(a)(7)[4] and 243(h).[5] Section 203(a)(7) provides for conditional entry of qualified refugees into the United States, and for adjustment of status to that of permanent resident for certain refugees already in the United States who could otherwise qualify as conditional entrants.[6] It was intended to supersede, in large part,

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[1]79 Stat. 912--15, 8 U.S.C. § 1153 (1965).

[2]66 Stat. 163, 8 U.S.C. § 1101 (1952).

[3]80 Stat. 1161 (1966).

[4]79 Stat. 912, 8 U.S.C. § 1153(a)(7) (1965).

[5]8 U.S.C. § 1253(h) (Supp. 1969), amending 8 U.S.C. § 1253(h) (1952).

[6]The text is found as a seventh preference for immigrants and reads as follows: Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country, (A) that (i) because of persecution or fear or persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (b) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East' means the area between and including (I) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

the parole provision of the Immigration and Nationality Act.[7] Section 243(h) contains provision for temporary relief from expulsion from the United States by withholding deportation, and thereby affords an indirect method for admission of refugees.[8] There are other means, under the Immigration and Nationality Act, by which a refugee may be relieved from expulsion.[9] But they are not limited to use in cases of refugees nor more widely used in refugee cases than in other situations.

Act of October 3, 1965

Litigation under Section 203(a)(7) has been on three main points: (1) the validity of the principle of "firm resettlement," that an alien fleeing from his homeland to the United States shall not have resettled firmly in an intermediate country on his way to the United States; (2) the constitutionality of Section 245 of the Immigration and Nationality Act[10] as a bar to adjustment of status, by an alien crewman, within the proviso to Section 203(a)(7);[11] and (3) the validity of 8 C.F.R. § 235.9(a)[12] which

[7]The parole provision is found in Section 212(d)(5), 66 Stat. 182, 8 U.S.C. § 1182(d)(5) (1952) and provides: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

See S. Rep. No. 748, Amending the Immigration and Nationality Act and for Other Purposes, 89th Cong., 1st Sess. 16-17 (1965); *Hearings Before Sub-Comm. No. 1 of House Comm. on Judiciary*, 89th Cong., 1st Sess., ser. 7, at 215 (1965) and *U.S. Code Cong. & Ad. News* 3334-35 (1965) for the distinction intended by Congress between conditional entry and parole.

[8]*See* note 5, *supra*. In its present language, Section 243(h) reads: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or public opinion and for such period of time as he deems to be necessary for such reason."

The 1965 amendment substituted "persecution on account of race, religion or public opinion" for "physical persecution."

[9]E.g., under Section 244 or Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1254 (1952), as amended, 8 U.S.C. § 1254 (1965) and 66 Stat. 217, 8 U.S.C. § 1255 (1952) respectively, which allow adjustment of status.

[10]*See* note 9 *supra*.

[11]*See* note 6 *supra*.

[12](1965). It read, at the time of the litigation under discussion: "Pursuant to agreements entered into with the governments of the countries concerned, officers of the [Immigration and Naturalization] Service are authorized to accept applications for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries."

On November 11, 1970 this regulation was amended to add Hong Kong as a location where applications for conditional entry under Section 203(a)(7) might be entertained. See 35 Fed. Reg. 17322 (1970).

provided that applications for benefits under Section 203(a)(7) may be processed in any of seven countries—to the exclusion of the Far East.

At present, a split of authority exists on the validity of the principle of firm resettlement.[13] The Ninth Circuit has found no mandate in legislative history, nor in agency decisions or practice, that an applicant for conditional entry into the United States shall not have resettled firmly in an intermediate country.[14] The Second Circuit has recognized the validity of the principle of firm resettlement and, in *Shen* v. *Esperdy*[15] upheld, on appeal, the finding of the United States District Court[16] that Shen had resettled firmly in Taiwan before he came to the United States. Thus, the Court of Appeals concluded that he was barred rightly from conditional entry into the United States.

Both Circuits examined legislative history on the point of firm resettlement and reached different conclusions. Woo and Shen each entered the United States after protracted stays in intermediate countries.[17] The Ninth Circuit negated the principle of firm resettlement after the court below had determined that, on the facts, Woo had not resettled firmly in Hong Kong.[18] The Second Circuit gave substantial weight to agency practice and to prior administrative and judicial opinions.[19]

In analyzing the legislative history of Section 203(a)(7), the Ninth Circuit found it significant that the term "firmly resettled" had, since 1957, been deleted from legislation regarding refugees. The Second Circuit considered the 1957 and 1960 statutes,[20] both of which had deleted the phrase, as essentially *ad hoc* measures. The Second Circuit found that the language of the present statute, Section 203(a)(7), that an applicant not be a national of the country in which his application was made, did not vitiate the principle of firm resettlement. It meant only that an applicant might not be a national of one of the seven countries listed in 8 C.F.R. §235.9(a), in which applications for conditional entry may be made. The Second Circuit stated that an application, made within the proviso to Section 203(a)(7) by

[13]The cases which are the subject of discussion here are Yee Chien Woo v. Rosenberg, 419 F.2d 252 (9th Cir. 1969), *cert. granted,* —U.S.—(Oct. 19, 1970) and Peter Chow Lung Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970).

[14]Woo v. Rosenberg, *supra* note 13. "Agency" means the Immigration and Naturalization Service.

[15]*See* note 13 *supra.*

[16]Peter Chow Lung Shen v. Esperdy, 68 Civil 3331 (S.D.N.Y. Sept. 30, 1969).

[17]Both fled the mainland of China, Shen in 1948, Woo in 1953. Woo sojourned for seven years in Hong Kong; Shen stayed nine years in Taiwan.

[18]*See* Yee Chien Woo v. Rosenberg, 295 F. Supp. 1370 (S.D. Calif. 1968).

[19]*See* e.g. Min Chin Wu v. Fullilove, 282 F. Supp. 63 (N.D. Calif. 1968) and Board of Immigration Appeals decisions cited in Shen v. Esperdy, *supra* note 13.

[20]Respectively, the Act of Sept. 11, 1957 (Refugee-Escapee Act), 71 Stat. 639, and the Act of July 14, 1960 (Refugee Fair Share Law), 74 Stat. 504.

an alien, like Shen or Woo, who was already in the United States, was governed by 8 C.F.R. §245.4[21] and not by 8 C.F.R. §235.9.

The two latter points, noted earlier, on Section 203(a)(7) were litigated recently in *Luen Kwan Fu v. Immigration and Naturalization Service*[22] which, as the Second Circuit indicated, was governed by a prior decision in the same Circuit, *Tai Mui v. Esperdy*.[23] The agency determination[24] that alien crewmen are ineligible to adjust their status within the proviso to Section 203(a)(7) and the regulation[25] providing overseas locations—to the exclusion of the Far East—to process applications for conditional entry were found not unconstitutional by the United States Court of Appeals.

The same Court, in *Tai Mui v. Esperdy* in 1966, decided that adjustment of status within the proviso to Section 203(a)(7) is governed by the general requirement for adjustment of status, prescribed by Section 245.[26] Section 245 expressly bars alien crewmen from adjusting their status to that of permanent residents.[27] The Second Circuit, in *Tai Mui,* found it significant that, in amending the Immigration and Nationality Act in 1965, Congress deleted the bar to alien crewmen who entered the United States on or before June 30, 1964 obtaining suspension of deportation,[28] but did not lift the bar to adjustment by crewmen under Section 245.

In the stage of agency decision, the District Director had turned down

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[21](1969). This regulation recites that: "The provision of section 245 of the Act and this Part [245] shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) shall execute and attach to his application for adjustment of status, Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination."

[22]131 F.2d 73 (2d Cir. 1970).

[23]371 F.2d 772 (2d Cir. 1966), *cert. denied,* 386 U.S. 1017. Fu, like Tai Mui, was an overstay Chinese crewman who had remained in the United States illegally for several years prior to his application for adjustment of status.

[24]I.e. determination that adjustment of status within the proviso to Section 203(a)(7) was governed by Section 245.

[25]8 C.F.R. §235.9(a).

[26]*Cf.* Wong Pak Yan v. Rinaldi, 427 F.2d 15-1 U.S. (Oct. 12, 1970), (3d Cir. 1970), *cert. denied* which held that 8 C.F.R. § 245.4 is not unconstitutional. For the text of that regulation see note 21, *supra.*

[27]*See also* 8 C.F.R. §245.1(a) (1965). Section 245(a) declares: "The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

[28]*See* Section 244(f) of the Immigration and Nationality Act, 79 Stat. 918, 8 U.S.C. §1254(f) (1965), amending 8 U.S.C. §1254(f) (1962).

the Section 203(a)(7) application of Tai Mui while, in the case of Luen Kwan Fu, the Special Inquiry Officer ordered deportation of the alien crewman, considering it unnecessary to delay until the District Director should surely have denied the crewman's application for conditional entry. The Court of Appeals ruled that the failure of the Act or the regulations to provide that the District Director first act, under 8 C.F.R. §245.1(d),[29] on Fu's application, was not an abridgment of a constitutional right.

In both *Tai Mui* and *Luen Kwan Fu* the challenge to the regulation, 8 C.F.R. §235.9,[30] as arbitrary and invalid, was turned aside by the Second Circuit: statistics on the admission of conditional entrants from the Far East did not warrant establishment of a center in that area to process applications under Section 203(a)(7).

Section 243(h), enacted as part of the original Immigration and Nationality Act, provides for withholding of deportation—at the discretion of the Attorney General.[31] This section, in affording temporary relief from expulsion from the United States for those refugees who qualify, offers, in effect, temporary admission to this country. So far, relief has been granted sparingly under this section.[32] Although much litigation has arisen over agency denial of relief under this section, the courts have generally upheld agency determinations.[33] The often-time lengthy litigation over denials has itself afforded many aliens extended sojourns in the United States.

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[29]1965. It recites, in pertinent part: ". . . An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in §245.4, unless the district director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act."

Note that 8 C.F.R. §245.4 makes the District Director's decision final on an adjustment of status within the proviso to Section 203(a)(7). For references to 8 C.F.R. §245.4 *see* notes 21 and 26 *supra*. In Fu's case the explicit bar of Section 245 to adjustment of status by crewmen was paramount.

[30]For the text of 8 C.F.R. § 239(a) see note 12, *supra*. Noted also, at that point, is the recent amendment to the regulation.

[31]For the text of Section 243(h) see note 8, *supra*.

[32]*Staff of Sub-Comm. No. 1, House Comm. on Judiciary*, 89th Cong., 2d Sess., *Immigration and Nationality Act, with Amendments and Notes on Related Laws and Summaries of Pertinent Judicial Decisions* 244 (Comm. Print 1969); Evans, *Political Refugees and The United States Immigration Laws: A Case Note*, 62 AM. J. INT'L. L. 924 (1968); Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAWYER 242, 253 (1969); *cf.* 2 Gordon & Rosenfield, *Immigration Law and Procedure*, 8-115 & 8-116 (Rev. ed. 1967).

[33]*Immigration and Nationality Act, supra* note 32; Evans, *op. cit.*, 62 AM. J. INT'L. L., *supra* note 32, at 924-26; 1 Gordon & Rosenfield, *op. cit., supra* note 32 at 5-123. One writer ascribes the paucity of decisions for the alien in Section 243(h) appeals to the following situation: "The bare facts of the case, the weight of the alien's evidence, the balance between this evidence and the Government's, or the court's sensitivity to the foreign policy implications of the case, all militate against a decision for the alien." Evans, *op. cit.*, 3 INT'L. LAWYER, *supra* note 32 at 242.

In a recent significant case, concerning Section 243(h), *Kovac v. Immigration and Naturalization Service*,[34] the Ninth Circuit reversed a lower court decision for the Government.

Kovac entered the United States as a crewman, overstayed and sought relief from deportation under Section 243(h). Relief was denied by the Special Inquiry Officer, and denial affirmed by the Board of Immigration Appeals. The Special Inquiry Officer based his decision on the alien's claim of possible persecution in Yugoslavia in the form of prosecution for deserting his ship, a Yugoslav vessel. But the alien was found to have claimed before the agency, that he had encountered earlier discrimination against him in Yugoslavia as a person of Hungarian extraction who had refused to inform on other Hungarians and had lost jobs as a consequence. The Ninth Circuit found, as well, that he claimed return to Yugoslavia would result in physical abuse and long confinement due to his open defiance of Communism in having sought asylum in the United States.

The agency decision, according to the Court of Appeals, was based on erroneous standards employed: (1) the court said fear of persecution was for having sought asylum, not for having merely deserted his ship; (2) the consequence of deportation was judged according to what persecution had occurred in the cases of other seamen who had sought asylum in the United States and not what could occur to this alien and (3) the possibility of persecution was determined according to whether this alien could obtain some employment later in Yugoslavia, and not whether the alien might suffer economically for his political opinions.[35] The Court of Appeals indicated that it believed the alien might have been handicapped at the Service hearing by lack of knowledge of English.

In another recent case on the same section, *Muskardin v. Immigration and Naturalization Service*,[36] the Service avoided the pitfalls of the Kovac case[37] in employing erroneous standards for a decision, and the court found no abuse of discretion in the administrative denial of withholding deportation. Muskardin, too, was an overstay Yugoslav crewman. He alleged, before the Service, possible persecution upon deportation to his homeland

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[34]407 F.2d 102 (9th Cir. 1969).

[35]The Court said that the Service erroneously employed a standard which was valid before the 1965 amendment of Section 243(h) which changed the wording of that section. See note 8 *supra*. *See* further 1 Gordon & Rosenfield, *op. cit.*, *supra* note 32 at 5-122.

For a recent case in which the petitioner attempted to rely on the *Kovac* case see *Shkukani v. Immigration and Naturalization Service*. F.2d (8th Cir., Jan. 4, 1971).

[36]415 F.2d 865 (2d Cir. 1969).

[37]*See* Evans, *op. cit.*, 3 INT'L. LAWYER, note 32 *supra* at 230-31 on requirements for agency procedure in Section 243(h) proceedings and 2 Gordon & Rosenfield, *op. cit.*, note 32 *supra*, at 8-114 on procedure in Section 243(h) cases.

because, as a Catholic, he disliked Communism, and because he could be prosecuted for jumping ship.[38] Unlike Kovac, however, he had not previously been in difficulty with the Yugoslav regime.

The Act of October 3, 1965 has provided a haven in the United States for a number of refugees from the recent political turmoil in Czechoslovakia. It is likely that over 9,000 Czech refugees were admitted, or otherwise permitted to remain, in the United States by the end of 1969.[39] As of October 1, 1969, 4,032 Czech refugees had obtained approval of applications for conditional entry into the United States.[40]

Act of November 2, 1966

The Act of November 2, 1966[41] was passed to afford, to Cuban refugees who met certain requirements,[42] benefits in the form of adjustment of status to that of permanent resident in the United States from parolee or other non-immigrant status, and a "roll-back" of thirty months in setting the effective date for commencement of permanent residence in the cases both of those Cuban refugees eligible to adjust their status and of those who were already permanent residents.[43]

Recently, several agency decisions have been handed down which interpret parts of the above statute. In *Matter of Milian*,[44] the Immigration and Naturalization Service ruled that the wife of a Cuban native and citizen need not herself be a Cuban native or citizen, nor have married a Cuban native or citizen, prior to her arrival in the United States[45] in order for her to come within the Act.

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[38]*Cf.* 1 Gordon & Rosenfiled, *op. cit.*, note 32 *supra* at 5-126 regarding treatment of the argument against deportation of an anti-Communist Catholic to Yugoslavia.

[39]See *Findings and Recommendations of Senate Sub-Comm. on Judiciary*, 91st Cong., 1st Sess., *U.S. Assistance to Refugees Throughout the World* 78 (Comm. Print 1969).

For an administrative holding that refugee status, in the case of a Czech applicant for conditional entry, originated after departure from Czechoslovakia and, in fact, during sojourn in the United States as a visitor at the time of the Soviet invasion of Czechoslovakia, see Matter of Zedkova, Int. Dec. #2062 (Reg. Commr. 1970).

[40]*See* note 39, *supra*, at 77.

[41]*See* note 3 *supra*.

[42]The alien must have been inspected and admitted or paroled into the United States subsequent to January 1, 1959; been physically present in the United States for at least two years prior to adjustment and eligible to receive an immigrant visa, and admissible to the United States for permanent residence.

[43]The record date is to be made, in the cases of those adjusting status, thirty months prior to the filing of an application for adjustment or the date of the alien's last arrival in the United States, whichever date is later and, in the cases of those already permanent residents, thirty months prior to November 2, 1966—the date of the Act—or the date the alien originally arrived in the United States as a parolee or non-immigrant whichever date is later.

[44]Int. Dec. #2023 (Acting Reg. Commr. 1970).

[45]In this case, the marriage occurred after the spouse's adjustment of status.

In *Matter of Costarelli,*[46] the Board of Immigration Appeals decided that, under this Act, an alien crewman who was not a native or citizen of Cuba, but who was the spouse of a Cuban native and citizen, might, unlike a crewman seeking adjustment under Section 245 of the Immigration and Nationality Act,[47] adjust his status.

[46]Int. Dec. #2047 (B.I.A. 1970).

[47]Under Section 245(a) an alien crewman may not adjust his status, but this decision has ruled that adjustment under the Act of November 2, 1966 is not governed by Section 245(a).